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No. 80-883

IN THE

Supreme Court of the United States

October Term, 1980

HARTZELL PROPELLER, INC.,

Petitioner,

v.

GAYNELL REYNO, as Personal Representative of the Estates of William Fehilly, et al.,

Respondent.

REPLY BRIEF OF PETITIONER

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ARGUMENT

The petition of Hartzell Propeller, Inc. ("Hartzell") for a writ of *certiorari* to the United States Court of Appeals for the Third Circuit was docketed on November 25, 1980.[1] Respondent Gaynell Reyno has filed an Opposition to Petitions for Writ of Certiorari to the United States Court of Appeals for the Third Circuit ("Brief in Opposition").[2] The following reply to Respondent's Brief in Opposition is made necessary by numerous mischaracterizations, misinterpretations, and misunderstandings contained therein.

First, Respondent's argument is almost completely limited to a response to what is termed an "overriding concern"[3] with and "undue emphasis"[4] upon the holding of the court below that the doctrine of *forum non conveniens* will not apply where dismissal would work a change in substantive law. It is claimed that Petitioner's

1. The Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit included a listing naming all parent companies, subsidiaries, and affiliates of Hartzell Propeller, Inc. *See* Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit at n. 1, *Hartzell Propeller, Inc. v. Reyno*, No. 80-883 (U. S., docketed November 25, 1980) [hereinafter cited as Petition].

2. That document is filed as a joint response to the petitions of Hartzell herein and of Piper Aircraft Company in a companion action. *See Piper Aircraft Co. v. Reyno*, No. 80-848 (U. S., docketed November 25, 1980).

3. Opposition to Petitions for Writ of Certiorari to the United States Court of Appeals for the Third Circuit at 4. *Hartzell Propeller, Inc. v. Reyno*, No. 80-883 (U. S., docketed November 25, 1980) [hereinafter cited as Brief in Opposition].

4. *Id.*

attention erroneously circumscribes [5] the decision below and the doctrine of *forum non conveniens* itself.[6]

Such an argument is blind both to the significance of this case and to its potential for emasculation [7] of the doctrine as announced by this Court.[8]

This argument further mischaracterizes the grounds upon which review is sought. It reveals an inability to meet Petitioner's assertions in support thereof. The petition herein presents four questions for review. The subject to which the Brief in Opposition is directed is but one of those questions.[9]

Second, Respondent's argument opposing review of the lower court's determination as to change of substantive law is erroneous and highly misleading. Respondent incorrectly concludes that the decision of this Court in *Van Dusen v. Barrack* [10] supports the *DeMateos-Reyno* rule.[11] In *Van Dusen* this Court considered whether a transfer between federal district courts ought to result in a change in applicable substantive law. It did not consider whether

5. *Id.* at 10.

6. *Id.* at 8.

7. *See Fitzgerald v. Texaco, Inc.*, 521 F. 2d 448, 453 (2d Cir. 1975), *cert. denied*, 423 U. S. 1052 (1976). *See also* Petition at 10-14.

8. *See, e.g., Gulf Oil Corp. v. Gilbert*, 330 U. S. 501 (1947).

9. *See* Petition at (i).

Notably, the majority of Petitioner's argument concerns subjects which the Brief in Opposition ignores. Respondent does not contest the grounds and necessity for review of questions concerning the weight of the choice of forum of a non-resident alien plaintiff, the standard for appellate review, and the extent to which witnesses and their testimony must be specified.

10. 376 U. S. 612 (1964).

11. *See* Petition at 6-8.

declination of jurisdiction in favor of litigation in the courts of a *foreign nation*, rather than mere *transfer* in favor of another *federal district court*, ought to result in a change in applicable substantive law. The limitation of the decision is clearly indicated by this Court's thoughtful analysis of 28 U. S. C. § 1404(a) termed "a congressional statute apportioning the business of the federal courts. . . ." [12] That statute, of course, makes no reference to transfer to or declination of jurisdiction in favor of a foreign tribunal.[13] Further, this Court observed that

> both the history and purposes of § 1404(a) indicate that it should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts and generally intended, on the basis of convenience and fairness, to authorize a change of courtrooms.[14]

Furthermore, *Van Dusen* is a decision fundamentally grounded in choice of law.[15] This Court's paramount

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12. *Van Dusen, supra* n. 10, at 637.

13. *See* 28 U. S. C. § 1404(a) (1976).

The inapplicability of *Van Dusen* to the international *forum non conveniens* context is illustrated by this Court's statement that a "change in venue under § 1404(a) generally should be, with respect to state law, but a change in courtrooms." *Van Dusen, supra*, n. 10, at 639. *Forum non conveniens* does not relate to change in venue within a single legal system. It concerns discretion of a legal system to decline jurisdiction. *Gulf Oil Corp. v. Gilbert, supra*, n. 8 at 504. Thus, decisions under a statute authorizing change in venue between federal district courts are not applicable to the issue presented herein.

14. *Van Dusen, supra* n. 10, at 636-37.

15. It is noteworthy that the *Van Dusen* Court gave little consideration to the criteria for transfer. That attention extended

concern was what law was to be applied upon transfer of an action from one federal district court to another.

This Court is empowered to determine what law should be applied by the transferee forum, a federal district court, under such circumstances. However, the instant case presents no question for decision by any American court as to what law shall be applied by the potential "transferee" forum, *i.e.*, Scotland. Indeed, it could not. Any foreign state has the power and right to change its own choice of law rules or substantive law at any time. Given the foregoing, Respondent's reliance upon *Van Dusen* to support the *DeMateos-Reyno* rule is unwarranted.

Respondent also contends that no conflict exists between the decisions of the Courts of Appeals for the Second and Third Circuits as to the effect of a change in substantive law.[16] Principal support for this argument is derived from an artful attempt to distinguish the facts of the instant case from those of *Fitzgerald v. Texaco, Inc.*[17] Variance between the facts of those cases, if it exists, is a distinction without a difference. No amount of factual contortion can alter the direct conflict between the legal principles for which each case stands.

Further, Respondent's attempt to distinguish the two decisions does not remove the material and direct conflict between the courts of appeals. Respondent recognizes that the Court of Appeals for the Third Circuit has held that a motion to dismiss on grounds of *forum non conven-*

15. (Cont'd.)
only to a reminder to lower courts that, in resolution of motions for transfer under Section 1404(a), difficulties in application of foreign law by a transferee forum are to be considered. *Van Dusen, supra* n. 10, at 643-46.

16. Brief in Opposition at 7 and 10.

17. *Supra*, n. 7.

tens must be denied whenever dismissal would result in a change in the applicable law adverse to plaintiff.[18] No authority is provided to refute the assertion of Petitioner that the Court of Appeals for the Second Circuit and the district courts of which that circuit is comprised have consistently [19] determined to the contrary.

Respondent additionally distinguishes the instant case from *Fitzgerald* on the ground that, unlike *Fitzgerald*, the instant case is one in which "there has been posited by plaintiff strict liability on the part of two domestic corporations, with no *intervening causative organizations or individuals.*" [20] That statement is literally correct, yet it is highly misleading. It ignores actions presently pending before the courts of the United Kingdom in which Respondent seeks recovery from precisely such "intervening causative organizations or individuals." [21] Indeed, Petitioner's inability to implead the defendants in those actions if the instant case proceeds in the United States is one of the strongest factors in favor of a *forum non conveniens*

18. Brief in Opposition at 4-5.

19. *See Collins v. Hilton International Co.*, 638 F. 2d 1344 (2d Cir. 1980); *Fosen v. United Technologies Corp.*, — F. 2d — (2d Cir. 1980); *Koupetoris v. Konkar Intrepid Corp.*, 535 F. 2d 1392, 1397 n. 22 (2d Cir. 1976); *Danser v. Firestone Tire & Rubber Co.*, 86 F. R. D. 120, 122 (S. D. N. Y. 1980); *Orion Insurance Co., Ltd. v. United Technologies Corp.*, 15 Av. Cases 18,061, 18,062 (S. D. N. Y. 1980), *quoting Fitzgerald, supra* n. 7, at 453; *Shepard Niles Crane & Hoist Corp. v. Fiat S. p. A.*, 84 F. R. D. 299, 306 (W. D. N. Y. 1979), *quoting Fitzgerald, supra* n. 7, at 453; *Abouchalache v. Hilton International Co.*, 464 F. Supp. 94, 94 (S. D. N. Y. 1978), *quoting Fitzgerald, supra* n. 7, at 453; *Texaco Trinidad, Inc. v. Astro Exito Navegacion, S. A., Panama*, 437 F. Supp. 331, 334 (S. D. N. Y. 1977), *quoting Fitzgerald, supra* n. 7, at 453.

20. Brief in Opposition at 7 (emphasis added).

21. *See* Petition at 2-3.

dismissal. Such an approach was followed both in *Fitzgerald* and the very recent decision of the Court of Appeals for the District of Columbia Circuit in *Pain v. United Technologies Corp.*[22]

Additionally, Respondent attempts to denigrate the conflict between the courts of appeals on the question of change of law by representation that "this Court has to date declined to comment on such alleged discrepancy between the Circuits. . . ."[23] In support thereof Respondent cites denials of petitions for writs of certiorari in *Fitzgerald* and in *DeMateos v. Texaco, Inc.*[24] Denial of those petitions[25] does not indicate a refusal to comment upon the conflict presented herein. The *Fitzgerald* rule was announced by the Court of Appeals for the Second Circuit in 1975. The *DeMateos-Reyno* rule initially arose upon the Court of Appeals for the Third Circuit's decision in *DeMateos* in 1977. It is elemental, therefore, that this Court could not decline to comment upon a conflict nonexistent at the time of its denial of *certiorari* in *Fitzgerald* in 1976. Further, this Court's denial of *certiorari* in *DeMateos* in 1978 does not show a refusal to comment upon the conflict between the circuits presented herein. In *DeMateos* petitioner did not seek review with respect to the questions of *forum non conveniens* which are the subject of the instant petition.

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22. *Fitzgerald, supra* n. 7 at 453; *Pain v. United Technologies Corp.*, Nos. 79-1730-34 at 27-29 (D. C. Cir. 1980).

23. Brief in Opposition at 7.

24. Brief in Opposition at 7 n. 11, citing *Fitzgerald v. Texaco, Inc.*, 423 U. S. 1052 (1976); *DeMateos v. Texaco, Inc.*, 435 U. S. 904 (1978).

25. *See* Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, *DeMateos v. Texaco, Inc.*, 435 U. S. 904 (1978); Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit, *Fitzgerald v. Texaco, Inc.*, 423 U. S. 1052 (1976).

Third, Respondent has misstated the facts of this case. It is alleged that "[a]lthough some inconsistencies remain regarding the cause of the aircrash, it has become clear that prior to the crash . . . [a] . . . propeller malfunction occurred." [26] The record does not support this statement.[27]

Fourth, Respondent has persisted in a practice of disingenuous confusion between and group reference to your petitioner and Piper Aircraft Company. Reference is made to "*defendants'* prior insistence, in the context of formal motions, that . . . [Pennsylvania] . . . represents the most appropriate forum for the resolution of this dispute." [28] The petition herein makes clear that this statement is inaccurate.[29]

Finally, Respondent argues that the inquiry dispositive of the instant petition for review is whether the decision below was "prejudicial" and "disruptive of federal law." [30] Petitioner finds no authority for the proposition that these are the standards for disposition of a petition for writ of *certiorari*.

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26. Brief in Opposition at 1.

27. *See* Petition at 3, nn. 4 & 5.

28. Brief in Opposition at 2. *See also Id.* at 9.

29. *See* Petition at 4 n. 10.

30. *See* Brief in Opposition at 1 and 4.

CONCLUSION

For the foregoing reasons and those set forth in the petition, Hartzell Propeller, Inc. respectfully prays the Court to issue a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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